In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 955

HELEN DOROTHY ZABEL, Extrx., *et al.*, Petitioners

v.

R. P. TABB, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21-49) is reported at 430 F.2d 199. The opinion of the district court (Pet. App. 50-63) is reported at 296 F. Supp. 764. The decision of the Secretary of the Army (Pet. App. 64) is not reported.

JURISDICTION

The judgment of the court of appeals was filed on July 16, 1970 (Pet. App. 65), and a petition for

rehearing was denied on August 10, 1970 (Pet. App. 66). The petition for a writ of certiorari was filed on November 9, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Congress, in the Rivers and Harbors Act of 1899 and the Fish and Wildlife Coordination Act of 1958, has authorized the Secretary of the Army to deny an owner of lands beneath navigable waters a permit to dredge and fill where the work will have a harmful effect on fish and wildlife and would be against the public interest.

2. Whether Congress may constitutionally authorize the Secretary of the Army to refuse to lift the congressional ban on filling in navigable waters for those reasons.

STATUTES INVOLVED

Section 10 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1151, 33 U.S.C. 403, provides:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended

by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Sections 2 and 2(a) of the Fish and Wildlife Coordination Act of March 10, 1934, 48 Stat. 401, as amended, 16 U.S.C. 661 and 662(a), provide:

For the purpose of recognizing the vital contribution of our wildlife resources to the Nation, the increasing public interest and significance thereof due to expansion of our national economy and other factors, and to provide that wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs through the effectual and harmonious planning, development, maintenance, and coordination of wildlife conservation and rehabilitation for the purposes of sections 661-666c of this title in the United States, its Territories and possessions, the Secretary of the Interior is authorized (1) to provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat, in controlling losses of the same from disease or other causes, in minimizing damages from overabundant spe-

cies, in providing public shooting and fishing areas, including easements across public lands for access thereto, and in carrying out other measures necessary to effectuate the purposes of said sections; (2) to make surveys and investigations of the wildlife of the public domain, including lands and waters or interests therein acquired or controlled by any agency of the United States; and (3) to accept donations of land and contributions of funds in furtherance of the purposes of said sections.

Except as hereafter stated in subsection (h) of this section, whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development.

STATEMENT

Petitioners own land adjacent to Boca Ciega Bay and littoral land underlying the Bay of Pinellas County near St. Petersburg, Florida (Pet. App. 22-23). The Bay is navigable water of the United States, being an arm of Tampa Bay which opens into the Gulf of Mexico (Pet. App. 23). Petitioners sought permission from state and local authorities to dredge and fill on their property in the Bay in order to construct a trailer park, with a bridge or culvert to their adjoining upland (Pet. App. 23). After obtaining that permission from the appropriate agencies, either by consent or court order,[1] petitioners then applied to the Corps of Engineers for a federal permit to perform the dredging and filling, under Section 10 of the Rivers and Harbors Act of 1899, *supra* (Pet. App. 24).

The application was formally opposed by several state and local agencies not having jurisdiction over the proposed work and by some 700 individuals. It was also opposed by the United States Fish and Wildlife Service of the Department of the Interior, because the Service believed that the dredging and filling would have a distinctly harmful effect on the fish and wildlife resources of the Bay (Pet. App. 24). A public hearing was held, after which respondent Tabb,

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[1] One such agency issued its permit only after it was ordered to do so by the Florida District Court of Appeal, *Pinellas County Water & Nav. Con. Auth.* v. *Zabel*, 179 So.2d 870, after the agency's initial refusal was overturned by the Supreme Court of Florida. *Zabel* v. *Pinellas County Water & Nav. Con. Auth.*, 171 So.2d 376.

the District Engineer, recommended denial of the application. Colonel Tabb stated in his recommendation that the "proposed work would have no material adverse effect on navigation" but that approval of the application would not serve the intent of Congress expressed in the Fish and Wildlife Coordination Act[2] in view of the damage to fish and wildlife resources expected to result from the proposed work (Pet. App. 24-25). The Secretary of the Army denied the application because issuance of the requested permit (Pet. App. 64):

> 1. Would result in a distinctly harmful effect on the fish and wildlife resources in Boca Ciega Bay,
>
> 2. Would be inconsistent with the purposes of the Fish and Wildlife Coordination Act of 1958, as amended (16 U.S.C. 662),
>
> 3. Is opposed by the Florida Board of Conservation on behalf of the State of Florida, and by the County Health Board of Pinellas County and the Board of County Commissioners of Pinellas County, and
>
> 4. Would be contrary to the public interest.

Petitioners then sued to review the Secretary's decision, seeking an order compelling the issuance of the permit (Pet. App. 25). The district court's order directing the Secretary to issue the permit (Pet. App. 63) was reversed by the court of appeals, which entered judgment for the Secretary (Pet. App. 49).

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[2] 48 Stat. 401, as amended, 16 U.S.C. 661 *et seq.*

ARGUMENT

The decision below, as stated by the court of appeals (Pet. App. 33-34):

> rests immediately on the Rivers and Harbors Act, 33 U.S.C.A. § 403, which declares that "the creation of any obstruction * * * to the navigable capacity of any of the waters of the United States is prohibited." The Act covers both building of structures and the excavating and filling in navigable waters. It is structured as a flat prohibition *unless*—the unless being the issuance of approval by the Secretary after recommendation of the Chief of Engineers. The Act itself does not put any restrictions on denial of a permit or the reasons why the Secretary may refuse to grant a permit to one seeking to build structures on or dredge and fill his own property. * * * [Footnotes omitted.]

Petitioners do not contend that the 1899 Act is unconstitutional because of the flat prohibition or that the delegation to the Secretary of the power to grant relief from the prohibition was unlawful. See *Wisconsin* v. *Illinois*, 278 U.S. 367, 378. In exercising this power, the Secretary must be sensitive to the national policy of conservation of wildlife resources declared in the Fish and Wildlife Coordination Act, *supra*. His actions in this regard must be no less responsive to that policy, we submit, than that of other federal officers. Cf. *Udall* v. *Federal Power Commission*, 387 U.S. 428, 443-444, 450. The refusal to issue the permit was, therefore, a proper exercise of the Secretary's discretionary authority and correctly upheld as such by

the court of appeals.[4] Finally, there has been no charge that the Secretary was arbitrary or capricious in his determination. Accordingly, the court of appeals held that the Secretary was entitled to consider adverse ecological impact in passing on a permit application and that he could refuse to grant a permit to dredge and fill where, in his informed judgment, the Secretary determined that granting such permit would not be in the public interest.

This Court has said that the 1899 Act is a "broad expression of policy in unmistakable terms" (*Sanitary District* v. *United States*, 266 U.S. 405, 429), which must be read "charitably in light of the purpose to be served" (*United States* v. *Republic Steel Corp.*, 362 U.S. 482, 491). The Court has on numerous occasions recognized that considerations other than navigation may be weighed in granting, denying or revoking a permit under the Act. *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 426-427; *United States* v. *Dern*, 289 U.S. 352, 357, 359-361; *Sanitary District*, *supra*, 266 U.S. at 425-426. This broad approach, followed by the court below, is clearly appropriate under the federal commerce power, whose "authority is as broad as the needs of commerce." *Appalachian Power Co.*, *supra*, 311 U.S. at 426. Contrary to petitioners' argument (Pet. 9-13), passage of the Submerged

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[4] Contrary to petitioners' contention, no taking of property could result from such refusal, for the simple reason that petitioners never had a right to fill in the navigable waters of the United States. *Scranton* v. *Wheeler*, 179 U.S. 141, 163; *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 72. The most they had was an expectancy that the Secretary might lift the prohibition of the Act.

Lands Act, 67 Stat. 29, 43 U.S.C. 1301 *et seq.*, in no way restricted that authority. "The [Submerged Lands] Act left congressional power over commerce and the dominant navigational servitude of the United States precisely where it found them." *United States* v. *Rands*, 389 U.S. 121, 127.

There is no need for this Court to examine the range of factors the Secretary may consider in passing on permit applications under the 1899 Act. The court of appeals treated the subject thoroughly and, we submit, correctly. The lower court's opinion follows this Court's pronouncements and the result reached here is not in conflict with the decisions of this or any other court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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